**DELCONT (M) SDN. BHD.**

**v.**

**MOTOR SPORT INTERNATIONAL LTD. (SERVANT OR AGENTS AT FEDERAL TERRITORY LABUAN) & 2 ORS.**

HIGH COURT MALAYA, KUALA LUMPUR
DATO' KAMALANATHAN RATNAM JC
[CIVIL NO. D5-22-935-1994]
13 NOVEMBER 1995

***PRACTICE & PROCEDURE:*** *Order - Setting aside - Order made by Judge in Chambers on an appeal - Whether could be set aside - Whether to be appealed against - Whether Court could exercise its inherent jurisdiction to set aside order - Rules of the High Court 1980 O. 32 rr. 6 & 11(1), O. 42 r. 13, O. 55, O. 56 r. 1, O. 92 r. 4.*

***INTERPRETATION:*** *"Jurisdiction of Court" and "Power of Court" - Whether synonymous - Whether to be distinguished - Federal Constitution Art. 121 - Courts of Judicature Act 1964 s. 25.*

The plaintiff and the defendants had jointly undertaken a business venture whereby they brought to the Malaysian public the so called Big Foot Truck Shows. Misunderstandings arose between them and the plaintiff eventually sued the defendants for RM177,375 being their alleged share of profit. The plaintiff applied *ex-parte* for, and obtained through an order dated 8 November 1994 various injunctive orders against the defendants. The defendants applied for leave to enter conditional appearance, and then filed a fresh application to set aside the issue and service of the writ/claim of 8 November 1994. The Registrar allowed the prayer, whereupon the plaintiff appealed. The appeal came before Abdul Malik J on 21 June 1995 but on that date only the plaintiff' Counsel was present. The learned Judge nonetheless heard the plaintiff and deferred judgment to 10 July 1995, whereupon, in the presence of both parties, the Court made an order that *"Mahkamah telah meneliti perkara ini dan berpendapat bahawa rayuan hendaklah dibenarkan dengan kos tanpa kehadiran defendan 1 dan Peguamnya"*. The defendants applied to set aside this order, arguing, *inter alia*, that they could do so under O. 32 r. 6 of RHC, and that, in any case, the Court should invoke its inherent power under O. 92 r. 4 and set the order aside. The plaintiff argued that the Court had no inherent jurisdiction to set aside an order made on an appeal as there were no provisions made in the Rules for setting aside such an order. The primary issue that arose was whether an order made on an appeal to a Judge in Chambers could be set aside by the party who failed to attend the hearing on account of O. 32 r. 6 of the Rules, or whether under the Rules, such an order could only be appealed against.

**Held:**

**[1]** In an *inter-partes* application, where the defendant is absent though he had been duly served, the Court may proceed to hear the matter and that while the application so heard is not an *ex-parte* application, the hearing is *ex-parte* and the order made in such a hearing is an *ex-parte* order. However, although the order is an *ex-parte* order, a distinction has to be made between an application to reinstate a case which was struck out without it being heard and one which was disposed of after it was heard, i.e, where the plaintiff was present, argued the case and had satisfied the Court that they were right.

**[2]** There is a distinction between the exercise of jurisdiction and the exercise of power. The word "jurisdiction" denotes the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its power in matters over which by reason of their nature or by reason of extraterritoriality, it has no jurisdiction. Thus only where there is jurisdiction will there be conferred the power to act.

**[3]** There are provisions in the RHC for the setting aside an order of Court. As specific provisions have been stipulated, such specific provisions should be adhered to and not be overridden by the exercise of inherent jurisdiction.

**[4]** Under O. 56 r. 2 RHC an appeal is to a Superior Court i.e from that of the Deputy Registrar to the Judge in Chambers. Order 55, which relates to appeals from the Subordinate Courts, makes no provisions for the setting aside of an order made upon an appeal. It is clear that only in circumstances where there are specific provisions made for the setting aside of an order or judgment can the party applying to set aside make his application to the Court. In the circumstances the remedy for the aggrieved party is to appeal, as is made explicit by O. 56 r. 2.

**[5]** The defendants cannot avail themselves of O. 32 r. 6 RHC. The provisions of O. 32 will apply, unless there are specific rules elsewhere that expressly or impliedly do away with the said rules of general application. It is clear therefore that O. 32 r. 6 of RHC cannot apply here. Also, r. 13 of O. 32 makes it clear that the rule deals with the admission of evidence through affidavits. This indicates that the applicability is at the originating process stage and not at the appellate stage.

*[Application dismissed].*

**Cases referred to:**
*Boyle v. Sacker [1988] 29 CH 249* ***(refd)***
*Wea Records Ltd. v. Visions Channel 4 Ltd. and Others [1983] 2 AER 589, 593 CA* ***(refd)***
*Vint v. Hudspith [1885] 29 Ch. D 322* ***(refd)***
*Re Grove, A Solicitor [1887-88] 4 TLR 272* ***(refd)***
*Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn. Bhd. Garnishee) [1990] 1 MLJ 445* ***(foll)***
*UMBC Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd. [1988] 1 MLJ 546* ***(foll)***
*First Consolidated Sdn. Bhd. v. Padu Ehsan Sdn. Bhd. (Majlis Perbadanan Melaka Bandaraya Bersejarah as Garnishee) [1994] 3 AMR 2578* ***(refd)***
*Kandasamy a/l Sreenivasgam v. Syarikat Muzwina Development Sdn. Bhd. [1990] 1 MLJ 15* ***(refd)***
*Willis v. Earl Beauchamp [1886] 11 PD 58* ***(refd)***
*Connelly v. Director of Public Prosecutions [1964] AC 1254* ***(refd)***
*The Venus Destiny [1980] 1 AER 718* ***(refd)***
*K.I. Muhiudeen Rawther v. K.E.P. Abdul Kassim & Ors. [1959] 25 MLJ 257* ***(refd)***
*Permodalan MBf Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors. [1988] 1 MLJ 178* ***(foll)***
*Attorney-General v. H.R.H. Prince Ernest Augustus of Hanover [1957] 1 AER 49-53* ***(refd)***
*Canada Sugar Refining Company v. R [1898] AC 735* ***(refd)***
*Krishnadas & Ors. v. Maniyam [1993] 3 MLJ 465* ***(refd)***
*Majlis Peguam Malaysia & Ors. v. Au Kong Weng Joseph [1993] 2 MLJ 57* ***(refd)***
*Tan Weng Chiang v. PP [1992] 2 MLJ 625* ***(refd)***
*Permata Chartered Merchant Bank Bhd. v. Hien Fook Realty (Holdings) Sdn. Bhd. & Ors. [1992] 1 MLJ 73* ***(foll)***
*Hession v. Jones [1914] 2 KB 421* ***(foll)***
*Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed [1974] 1 MLJ 58* ***(refd)***
*Tong Lee Hua & Anor. v. Malayan Banking Bhd. [1978] 1 MLJ 257* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 25
Federal Constitution Arts. 121(1), 121(1A)
Legal Profession Act, 1976 (Act 166), s. 26.
Rules of the High Court 1980, O. 1 r. 4(2), O. 6 r. 6(1), O. 11, O. 32 rr. 6, 11(1), 13, O. 42 r. 13, O. 55, O. 56 r. 2, O. 81, O. 92 r. 4.

*For the applicants/plaintiffs - Maidzuara Mohammed; M/s. Shearn Delamore & Co.*
*For the respondents/defendants - C.L. Chin; M/s. Syarikat Radhakrishnan*

**JUDGMENT**

**Kamalanathan Ratnam JC:**

*Facts Leading To This Application*

This was an application by the first defendants for leave to file this application out of time and for a prayer that the order dated 10 July 1995 given by Dato' Haji Abdul Malek J upon the hearing of an appeal from the Senior Assistant Registrar in the absence of the first defendants or their solicitors, be set aside and for the usual other consequential reliefs.

The first defendants were the producers of motor truck shows known as the Big Foot Truck Shows. The second and third defendants were directors of the first defendants. The plaintiffs, a locally incorporated company were desirous of bringing to the Malaysian public the Big Foot Truck Shows and they signed an agreement with the first defendants on 9 July 1994 for various road shows in Malaysia hereinafter referred to as the said agreement. The shows were a success.

The plaintiffs alleged that when asked to produce the expense accounts in order to work out the plaintiffs' profits, the defendants refused to do so. In the circumstances the plaintiffs proceeded to work out their own estimated profits and having reached a figure of RM954,750 demanded their half share of RM477,375 pursuant to the said agreement. Since a sum of RM300,000 had already been paid to the plaintiffs by the defendants the plaintiffs sought recovery of the balance sum of RM177,375.

As the plaintiffs were no longer involved in the production of the said show the first defendants had to terminate their shows as they were without permits.

The plaintiffs also contended that in addition to the sum of RM177,375 due to them the defendants owed a further sum of RM316,463.36 as tax. They also sought *vide* their writ, various injunctive orders and costs. The plaintiffs *vide* an *ex parte* order dated 8 November 1994 obtained the various injunctive orders. As the said order is not relevant to the present application I shall not deal with the same any further.

The first defendants then filed an application for leave to enter conditional appearance contending that since all three defendants were foreigners, the plaintiffs had failed to comply with O. 6 r. 6(1) of the Rules of the High Court 1980. The defendants filed a further application to set aside or vary the order granting the plaintiffs various injunctive orders. The said order was varied on terms by Dato' Hj. Abdul Malek J in Chambers.

In the meantime, the defendants filed a fresh application to set aside the issue and service of the writ and claim dated 8 November 1994 on the grounds that the first defendants are registered in the United Kingdom. Since there was non-compliance with O. 6 r. 6(1) and

O. 11 of the Rules of the High Court 1980 the first defendants sought to move the Court accordingly. The Timbalan Pendaftar who heard the application allowed the first defendants' prayers to set aside the issue and service of the writ on 28 November 1994. The plaintiffs appealed against the said decision which is Enclosure 40.

Enclosure 40 came up for hearing before Dato' Hj. Abdul Malek J on 21 June 1995. The appellants' Counsel was present but neither the respondents nor their Counsel were present. Since the appellants requested the matter to proceed the Court heard the submission and reserved judgment to 10 July 1995.

On 10 July 1995 both the appellants' Counsel and the respondents' Counsel were present and the Court made the following order:

> Mahkamah telah meneliti perkara ini dan berpendapat bahawa rayuan hendaklah dibenarkan dengan kos tanpa kehadiran defendan 1 dan Peguamnya.

It is against that order that the first defendants make the present application.

*Whether An Ex Parte Order Of A Judge Made On An Appeal Ought To Be Set Aside Or Appealed Against*

The appellants/first defendants contend that the order made by Dato' Hj. Abdul Malek J on 10 July 1995 was an *ex parte* order and that this was clear from reading the order of the Judge itself. They argued that although the Judge had made the order it has as yet not been extracted and Mr. Chin, Counsel for the respondents, confirmed that the order has indeed not been extracted.

Cik Maidzuara for the applicants referred to *Boyle v. Sacker* [1988] 29 CH 249.

This case considered an order made in the absence of a party and it raises the three issues which had arisen in this case, i.e.:

(a) an order being made wherein the opposing party had not had an opportunity of being heard is an *ex parte* order.

(b) that if it is an *ex parte* order then the applicants have to apply to set it aside, i.e. to discharge the order.

(c) that it can be made either to the same Judge or to a Judge who is now hearing the matter.

Cotton LJ said at page 251:

> ... discharging an order is not the same thing as reversing or varying an order, it does not go on the ground that there has been an erroneous decision, but on the ground that the opposing party has not had an opportunity of being heard. I am, therefore, of opinion, that an application of this Court, not being an appeal from the Court to which the application ought to have been made, is irregular.

I was also referred to *Wea Records Ltd. v. Visions Channel 4 Ltd. & Others* [1983] 2 AER 589, 593 CA wherein Donaldson MR said:

> As I have said, *ex parte* orders are essentially provisional in nature. They are made by the Judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in

his possession, whether or not it assists his application, this is no basis for making a definitive order and every Judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this Court against an *ex parte* order without first giving the Judge who made it or, if he was not available, another High Court Judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party; see RSC Ord. 35, r. 2.

In *Vint v. Hudspith* [1885] 29 Ch. D 322, 323 the action was set for hearing and since the plaintiffs failed to appear the action was dismissed with costs. Against this the plaintiffs appealed to the Court of Appeal. Cotton LJ was of the opinion that the plaintiffs' proper course was to apply to the Judge to restore the cause on the ground that the plaintiff was absent *per incuriam.* Whilst he held that the appellate Court can entertain an appeal from a judgment by default, but in a case like this, he said,

... to prevent the Court of Appeal from being flooded by having to hear cases in the first instance it is therefore right that the plaintiff should first apply to the Judge who gave the judgement to restore the action.

Counsel for the applicant herein drew a distinction between *Vint's* case which was a case fixed for trial and in *Re Grove, A solicitor* [1887-88] 4 TLR 272 where an order to cross-examine a respondent on his affidavit was made. On appeal to the Divisional Court the respondent in whose favour the order was earlier made, failed to attend and the Divisional Court discharged the order. The respondent appealed to the Court of Appeal which held that though the course pointed out in *Vint v. Hudspith* of applying to Court below for a rehearing was the proper course, still the Court of Appeal had jurisdiction to hear the appeal, the case of a respondent not appearing in the Court below being very different from an appellant not appearing there.

I am informed by both Counsel that their research has not led them to find a case of a similar nature where on appeal to a Judge in chambers under O. 56 r. (1) of Rules of the High Court 1980 when one party fails to attend, whether the defaulting party can rely on the provisions of O. 32 r. 6.

In *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn. Bhd. Garnishee)* [1990] 1 MLJ 445 V.C. George J (as His Lordship then was) reviewed the position of an *inter partes* application where the defendant is absent though duly served.

He said:

Now, a strong quorum of the Singapore Court of Appeal had held in *United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd.* [1968] 2 MLJ 85] at p. 87 that where the defendant though served fails to appear, the order made in an *inter partes* application is an *ex parte* order:

The first question for consideration is whether or not the order made on the originating summons was an *ex parte* order and comes within O. LIII r. 4(l). The originating summons in this case was served on Tay Soo Tong by substituted service and he had made no appearance and in such a case O. LI r. 16 provides:

> Where any party who had been duly served fails to attend at the time appointed for the hearing, the Judge may proceed *ex parte*, if he thinks it expedient to do so and may require such evidence of service as he thinks fit.
>
> It is clear then that a Judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing.
>
> An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte* order within the terms of O. LIII r. 4(1).

This dictum was considered and applied by Edgar Joseph Jr. J in *UMBC Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd.* [1988] I MLJ 546] at p 547. What is relevant for the purposes of the instant case is the *ratio decidendi* that resulted in the Singapore Court of Appeal in the former and Edgar Joseph Jr. J in the latter case holding that in an *inter partes* application, where the defendant is absent though he had been duly served, the Court may proceed to hear the matter and that while the application so heard is not an *ex parte* application, the hearing in the absence of the defendant is an *ex parte* hearing and the order made on such a hearing is an *ex parte* order. Applying that *ratio* to the instant case, it cannot but be held that the order made on 13 April 1988 was an *ex parte* order made in chambers.

Now the application in the instant case that resulted in the making of the order nisi and on its further consideration in the said order being made absolute was a summons to be proceeded with in chambers. Order 32 sets out the rules for 'Applications and Proceedings in Chambers'. These rules in O. 32 have general application to applications and proceedings in chambers unless there are specific rules elsewhere that expressly or even impliedly do away with the said rules of general application.

His Lordship was quick to hold that O. 32 provides for general application unless there are specific rules elsewhere that expressly or even impliedly do away with the said rules of general application. I shall come back to this little egress provided by His Lordship, later.

Finally the applicants seek this Court's inherent power to invoke O. 92 r. 4 of the Rules of the High Court 1980 to prevent injustice and to allow the application to set aside the order made by Dato' Haji Abdul Malek J on 10 July 1995. Counsel relied on *First Consolidated Sdn. Bhd. v. Padu Ehsan Sdn. Bhd. (Majlis Perbadanan Melaka Bandaraya Bersejarah as Garnishee)* [1994] 3 AMR 2578, 2581.

Mr. Chin in his submission argued that under O. 56 r. 2 of the Rules of the High Court 1980 an appeal is to a Superior Court, i.e. from that of the Deputy Registrar to the Judge in Chambers. He also argued that O. 55 which relates to appeals from the Subordinate Courts makes no provision for the setting aside of an order made upon an appeal. He argued with force that if a party seeks the Court to exercise its inherent jurisdiction then the Court can only do so on established principles otherwise there would be uncertainty in the administration of justice.

Both parties conceded that they were unable to find an authority where the Court has exercised its discretion and set aside an order made on an appeal.

It would seem that whilst the appellants' Counsel asked the Court to rely on O. 92 r. 4 and to apply the Court's inherent powers, the respondent was submitting on the Court's inherent jurisdiction.

*Is There A Difference Between The Inherent Jurisdiction And The Inherent Powers of The Court*

Clearly there lies a distinction between the exercise of jurisdiction and the exercise of power. The word jurisdiction has its origin from the Latin, *jurisdictio* i.e. to where the dictates of the law would apply.

Article 121(l) of the Federal Constitution sets out the jurisdiction and powers of the inferior and High Courts.

> 121. (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di Pertuan Agong may determine;
>
> (c) (Repealed),
>
> and such inferior Courts as may be provided by federal law and the High Courts and inferior Courts shall have such jurisdiction and powers as may be conferred by or under federal law.
>
> (1A) The Courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court.

The parent authority that confers the jurisdiction to the High Court to hear matters, further devolved such jurisdictional authority to a federal law, namely, the Courts of Judicature Act, 1964 which, to quote William Shakespeare, *"cabin'd and cribb'd"* the criminal and civil jurisdictions of the High Court. The High Court cannot act beyond the scope of the provisions of the Courts of Judicature Act 1964.

Article 121(lA) clearly spells out that the High Court has no jurisdiction over matters which are properly cognisable in the Syariah Court.

As to the powers to be exercised by the High Court, again such powers as can be exercised by the High Court must also be conferred upon it by or under a federal law (Article 121 (1)). Power is authority. Again s. 25 of the Courts of Judicature Act 1964 spells out the power that the High Court can exercise:

> Section 25. Powers of the High Court.
>
> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or Rules of Court relating to the same.

Thus it is plain and obvious that only where there is jurisdiction will there be conferred the power to act.

An illustration of this is the case of *Kandasamy a/l Sreenivasgam v. Syarikat Muzwina Development Sdn. Bhd.* [1990] 1 MLJ 15. In this case the plaintiff had agreed to purchase a piece of property from the defendants and part payment had been made and the plaintiff retained a certain sum claiming a right of set-off. Vacant possession was to be delivered to the plaintiff within 24 months of the agreement failing which there was a claim for immediate payment of liquidated damages calculated from day to day at 10% of the purchase price. Plaintiff applied for summary judgment, contending that his claim was for vacant possession and liquidated damages.

When the hearing of the application for summary judgment came up before the Senior Assistant Registrar the defence argued that the Senior Assistant Registrar had no jurisdiction to decide the matter as it involved specific performance for sale and purchase of property. Despite defendants' submission that theirs was only an application for vacant possession, the Senior Assistant Registrar agreed with the defence.

When the case came up for hearing before Abdul Malek J, His Lordship held that since O. 1 r. 4(2) of the Rules of the High Court 1980 provides that 'Court' means the High Court or any one or more Judges thereof, whether sitting in Court or in Chambers or the Registrar and as applications for specific performance of an agreement fall under O. 81 of the said Rules when the word 'Court' is used clearly the Registrar had jurisdiction. In other words the jurisdiction was conferred by O. 1 r. 4(2) and he had the power to hear under O. 81 of the said Rules.

The term "inherent jurisdiction" is not used in contra-distinction to the jurisdiction of the Court exercisable at common law or conferred on it by statute or rules of Court, for the Court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rule of Court: See *Willis v. Earl Beauchamp* [1886] 11 PD 58, 63. The jurisdiction of the Court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a Court of law: See *Connelly v. Director of Public Prosecutions* [1964] AC 1254, 1301. The overriding feature of the inherent jurisdiction of the Court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law. It must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of Court.

It may be said that the inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them: See *The Venus Destiny* [1980] 1 AER 718.

One of the greatest Judges this land has ever produced, H.T. Ong J (as His Lordship then was) drew a distinction between jurisdiction and power. He said in *K.I. Muhiudeen Rawther, v. K.E.P. Abdul Kassim & Ors.* [I959] 25 MLJ 257, 258*:*

> With the greatest respect, I think jurisdiction upon a matter in which a Judge had power to adjudicate ought to be distinguished from the powers given to the Judge under the Land Code. Jurisdiction and power are not terms which are synonymous and interchangeable. Support for this view can be found in the recent unreported judgment of the Court of Appeal in *Lee Lee*

*Cheng v. Seow Peng Kwang* [1960] 26 MLJ 1, 3 where Thomson CJ, in discussing s. 47 of the Courts Ordinance and the Second Schedule thereto, says:

> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the ordinance there is a distinction between the jurisdiction of a Court and its powers, and this suggests that the word "jurisdiction" is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its power in matters over which by reason of their nature or by reason of extraterritoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.

Mr. Chin further submitted that this Court has no inherent jurisdiction to set aside an order made on an appeal because there are provisions in the Rules of the High Court for setting aside an order of Court. And where there are specific provisions then such specific provisions should be adhered to and not be overridden by the exercise of inherent jurisdiction.

Order 42 r. 13 of the Rules of the High Court provides:

> 13. Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

I hold that O. 42 r. 13 will apply where there are provisions made in the Rules of the High Court for the setting aside or varying of any order or judgment. Only in such circumstances where there are specific provisions made for the setting aside of an order or judgment can the party applying to set aside make his application to the Court. If there is no such provision then the remedy for the aggrieved party is to appeal. Order 56 r. 2 is explicit:

> Subject to the provisions of s. 68 of the Act, a party may appeal against any judgment, order or decision made by a Judge in Chambers.

There is no provision for setting aside the judgment or order or decision.

I draw to mind the words of Syed Agil Barakbah SCJ in *Permodalan MBf Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors.* [1988] 1 MLJ 178, 181:

> It follows that where the rules contain provisions making available sufficient remedies, the Court will not invoke its inherent powers.

*Applicability of O. 32 Rules Of The High Court 1980*

I had earlier in my judgement indicated that I shall revert to V.C. George J's (as His Lordship then was) decision in *Loo Chay Meng.* His Lordship therein had also expressly stated that the provisions of O. 32 will apply unless there are specific rules elsewhere that expressly or even impliedly do away with the said rules of general application.

It is clear therefore that in this instant case the provisions of O. 32 r. 6 of the Rules of the High Court cannot apply.

If it is to be argued that an order made as a result of an appeal can be set aside under the provisions of O. 32 r. 6 then the only reference to 'an appeal' in the said order, is to be found in r. 11(l) which reads:

> 11. (i) The Judge in chambers may direct that any summons, application or appeal shall be heard in Court or shall be adjourned into Court to be so heard if he considers that by reason of its importance or for any other reason it should be so heard.

In such circumstances it is imperative to look into the cannon of construction of statutes. It is trite law that words in a statute cannot be looked at in isolation. In *Attorney-General v. H.R.H. Prince Ernest Augustus of Hanover* [1957] 1 AER 49-53, Viscount Simonds said:

> For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia* and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.

Further Lord Davey said in *Canada Sugar Refining Company v. R* [1898] AC 735, 741:

> ... every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

and these expressions of law have led to the moulding of another cannon of construction, i.e. the *ejusdem generis* principle and in *Krishnadas & Ors. v. Maniyam* [1993] 3 MLJ 465, Peh Swee Chin SCJ said:

> ... in considering a statute, where general words follow particular or specific words, such general words take their meaning from, and are presumed to be restricted to, the same genus as those particular or specific words, therefore the *ejusdem generis* rule applies.

In applying this principle to the instant case and looking at O. 32 r. 13 clearly this rule deals with the admission of evidence through affidavits. In other words it indicates the applicability at the originating process stage and not at the appellate stage.

However, I am of the view that the word "appeal" as referred to in O. 32 r. 11(1) does make provisions for cases where there are specific provisions for appeals to be sought by way of summons in chambers. Section 26 of the Legal Profession Act, 1976 (Act 166) specifically provides for an appeal to be by way of summons in chambers:

> 26. Appeal from the decision of Board to Judge
>
> (1) Any person dissatisfied with any decision of the Board may apply to a Judge for a review of decision.
>
> (2) If the Board fails to determine any request within six weeks after it has been first submitted to it, the applicant may apply under this section as if the request had been determined adversely to him.
>
> (3) Every application under this section shall be made by summons in chambers on the petition of the appellant if he has filed a petition, otherwise by originating summons; the Judge hearing the application may in his discretion adjourn the application into open Court.

(4) Every summons in chambers or originating summons, as the case may be, shall be supported by evidence on affidavit and shall be served together with the affidavit on the Board; such summons in chambers or originating summons shall not be heard before the expiry of twelve days after the date of service on the Board.

At this juncture it is appropriate to refer to the then Supreme Court decision in *Majlis Peguam Malaysia & Ors. v. Au. Kong Weng Joseph* [1993] 2 ML7 57 which held that:

> On general principle, where a statute regulates the exercise of a right or power or the use of a prescribed procedure, express reference to time being made, there is a marked inclination of the Court to regard the relevant provision as one which must be strictly and meticulously followed out. Sections 93-103 of the Act present a picture of a code of procedure in which time is given a place of paramount importance.

I am further guided by the stricture of Mohamed Azmi SCJ in *Tan Weng Chiang v. PP* [1992] 2 MLJ 625, 630 wherein His Lordship said:

> Where the meaning of words in the statute is plain and unambiguous, Judges should not invent fancy ambiguities.

I am not unmindful of the decision in *Permata Chartered Merchant Bank Bhd. v. Hien Fook Realty (Holdings) Sdn. Bhd. & Ors.* [1992] 1 MLJ 73, 76. In that case the defendants had filed a notice of appeal against a decision of the Senior Assistant Registrar. But when the appeal came up for hearing the plaintiff/respondent was represented by Counsel but neither the appellants/defendants nor their Counsel was present. Since there was no one to prosecute the appeal, V.C. George J (as His Lordship then was) struck off the appeal with costs. The defendants then sought to apply to reinstate the same appeal. His Lordship considered both the provisions of O. 56 and O. 32. In the course of his judgment he referred to *Hession v. Jones* [1914] 2 KB 421. The facts in *Hession's* case are similar to the present situation where the party that was absent was the respondent. The appellant was present and the appeal was heard and disposed of. V.C. George J (as His Lordship then was) concurred with the decision in *Hession's* case when he said:

> *Hession v. Jones* makes a clear distinction between an application to reinstate a case which was struck out without it being heard and one which was disposed of after it was heard.

In fact Bankes J expressed his views in *Hession v. Jones* [1914] 2 KB 421, 428 when he said, when considering *Vint's* case:

> The Court there draws a pointed distinction between the case where a proceeding is struck out for non-appearance of the appellant, and this case, where, although the respondent was absent, the appellant has argued the case and satisfied the Court that he was right. In my view this Court has no jurisdiction to make the order it is invited to make, and this motion must be dismissed.

In the circumstances, I am of the view that the applicants/plaintiff cannot avail themselves of O. 32 r. 6. There ought to have been an appeal filed under O. 56 r. 2 of the Rules of the High Court with leave to the Court of Appeal.

*Question of Merits*

On the question of merits the applicants' Counsel's reason for not attending the hearing of the appeal on 21 June 1995 was because she had failed to enter the date in her diary.

In response to this Mr. Chin referred me to *Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed* [1974] I MLJ 58 and to *Tong Lee Hua & Anor. v. Malayan Banking Bhd.* [1978] 1 MLJ 257. In both cases the mistake of a solicitor was held to be insufficient reasons for granting special leave. The applicant's reply to these two cases is that the cases related to special leave.

In my view, failure to enter the diary is not sufficient enough grounds to satisfy me that there are merits.

In the circumstances, I dismiss this application with costs.